not regard the word 'railroad' as synonymous with 'railway' or 'street passenger railway' when this section of the article was framed."

Railroad Commissioners.—Article 12, § 22, of the constitution of California, providing for and defining the duties and jurisdiction of the railroad commissioners, is as follows: "The state shall be divided into three districts as nearly equal in population as practicable, in each of which one railroad commissioner shall be elected. * * * Said commissioners shall have the power and it shall be their duty to establish rates of charges for the transportation of passengers and freight by railroad and other transportation companies." It was held, that the words "railroad and other transportation companies" do not include a street railway company in a municipality engaged in the business of carrying passengers on street railroad cars. Board of Railroad Commissioners *v.* Market Street R. Co., 132 Cal. 677, 64 Pac. 1065. Temple, J., dissenting.

Summary.—"These authorities show the necessity that exists for the courts, in all cases, to look carefully to the statute itself, in connection with the history of the times, and the contemporaneous legislation, in order to discover in what sense the word "railroad" is used, or to ascertain what particular kind of a railroad the legislature intended should come within its provision." Massachusetts Loan, etc., Co. *v.* Hamilton, 88 Fed. Rep. 588.

We think there can be no doubt that Va. Code, 1904, p. 707, § 1294k, was not intended to apply to street railroads. It is a matter of common knowledge that the many and great dangers to life and limb to which the numerous persons, engaged in operating railroads whose cars are moved by steam, were exposed, and the many different departments of labor in which such operatives were employed, were doubtless the principal reasons which induced the legislature to modify the rule heretofore governing the relation of master and servant, and prescribing their reciprocal duties and liabilities. But these reasons for changing the law do not exist in respect to those engaged in operating street railways. Besides, if we take the entire provisions of this state, and judge of the meaning of this word railroad from the context, that part reading "or locomotive engine, or who is charged with dispatching trains or transmitting telegraphic or telephonic messages," is almost conclusive of the legislative intent.

WATTS *et al. v.* C. I. JOHNSON & BOWMAN REAL ESTATE CORP.

June 14, 1906.

[54 S. E. 317.]

Easements—Abandonment.—Under a deed to the owner of a lot adjoining one owned by the grantor, conveying a part of the grantor's lot between a building thereon and the lot of the grantee, with privilege to build on the tract conveyed or on the grantee's lot, and to join the building to the lower side wall of the building on the grantor's lot, and to pierce the walls of the latter and insert timbers therein so as to have a convenient alley to be used in common by the grantor and grantee, where parties claiming under the grantor built a brick

wall at the opening into the alley, but had windows facing the alley and a sewer beneath it, they did not lose their rights to the alley by abandonment.

Appeal from Corporation Court of Lynchburg.

Action by C. I. Johnson & Bowman Real Estate Corporation against R. T. Watts and others. From a decree in favor of complainant, defendants appeal. Reversed.

Harrison & Long, for appellant.
Wilson & Manson, for appellee.

WHITTLE, J. Appellee's bill charges that appellants have abandoned their right to a joint alley separating two adjacent lots belonging to the parties, respectively, and fronting on Main street in the city of Lynchburg; and its prayer is that the court will remove the cloud upon the title of appellee to the entire alley by decreeing the alleged abandonment by appellants a perpetual bar to their claim to any interest therein.

Appellants demurred to the bill, and also filed their answer, denying its allegation and insisting upon their right to the continued enjoyment of the alley in common with appellee.

At the hearing the trial court passed a decree sustaining the contention of appellee, and adjudging the interest of appellants in the alley forfeited, from which decree this appeal was allowed.

The question for decision is one of law merely, upon practically undisputed facts.

The parties derived title to the alley in controversy from a common source, George E. Roberts, who, in the year 1841, conveyed to "Jno. M. Warwick and to his heirs and assigns, forever, all that piece or parcel of ground, situated on Second (now Main) street in the town of Lynchburg, between the lower corner of the brick tenement on said street, the property of the said George E. Roberts * * * and the upper line of the lot lying immediately below on the same street, belonging to the said John M. Warwick; the said piece or parcel of ground containing by estimation 5 feet, more or less, in front on the said street, and running back 132 feet, together with the privileges to the said John M. Warwick and his heirs and assigns, whenever disposed to build on the said piece or parcel of ground, or on the lot of ground belonging to the said Warwick, adjoining the same, to build up to and join such new building to, the lower side wall of the brick tenement aforesaid, belonging to the said Roberts, and to pierce the said walls and insert timbers therein, so as to have a convenient alley, 4½ feet wide, next to said wall of the brick tenement aforesaid, and running back 132 feet, which alley is to be used in common by the said Roberts and

Warwick, and their respective heirs and assigns, forever, and the use of the same is hereby expressly reserved to the said George E. Roberts, and to his heirs and assigns, forever."

There was a doorway in the wall of the brick tenement referred to in the foregoing deed, opening on the alley. The old building was destroyed by fire in the year 1883, and shortly after the fire appellants erected the present structure, which covers the entire lot, and used part of the old wall in the construction of the new building, filling in the doorway in the old wall with brick; so that at present there is no doorway in the wall to the new building opening on the alley, but there are windows in the side of the building overlooking the alley, and upon which it is in part dependent for light and air.

The house upon the lot of appellee, which was erected in the year 1844, is 50 or 60 feet long and two stories high; and the alley is built over from the top of the first story; the timbers in the building being imbedded in the old wall of the Roberts house. There is also a sewer under the alley, which has been continuously used in common by the parties and their predecessors in title for many years, the right of appellants to the use of which is established by the decree under review. It also appears that a short while before the institution of this suit appellants repaired the alley by cementing the cracks between the flagging, so as to prevent surface water from escaping into their cellar.

The avowed purpose of the litigation is to enable appellee to acquire absolute ownership of the alley, relieved of the easement reserved in the deed from Roberts to Warwick, and to erect a building covering the whole of it together with the adjoining lot; and the sole ground upon which the contention that appellants have forfeited their property in the alley by abandonment rests upon the allegation that they evinced an intention to abandon it by voluntarily cutting themselves off from its use as a right of way when they closed the doorway in the wall of the original building. But the conclusion drawn from that circumstance alone is, in our opinion, founded upon a misconception of the extent of appellants' rights under the stipulations of the Roberts' deed. The reservation of "a convenient alley 4½ feet wide, next to the said sidewall of the brick tenement aforesaid, and running back 132 feet, which alley is to be used in common by the said Roberts and Warwick and their respective heirs and assigns, forever," operated as a grant of an incorporeal hereditament, an interest in land, and carried to the beneficiaries, not a mere right to pass over the alley, but all incidental advantages which would accrue therefrom. Indeed, the alley might be of no practical utility as a mere right of way, and still be indispensable for other purposes, such as an entrance for light and air, and a location for the underlying sewer pipe. The owner of a lot

thus abutting upon an established alley is entitled to all its benefits, and cannot be deprived of his rights on the theory of abandonment because he elects to use it in one way rather than another.

The fundamental error in the case grows out of the too narrow construction of limiting appellants' rights to the special rather than the general use of the alley. The case, therefore, is not controlled by the doctrine applicable to the reservation or grant of a bare right of way, which, of course, carries only the right to such light and air and other incidents as are necessary to the convenient enjoyment of the particular right conferred. On the other hand, it is equally clear that the deed was not intended to invest Warwick, and those claiming under him, with the ground occupied by the alley for a building site.

"When an easement exists by express grant, its use must be confined to the terms and purposes of the grant. And it must further be used in a reasonable manner and so as not unnecessarily to injure the rights of the other party. The extent of the use, where unlimited by the grant, must be governed by what is reasonable and customary in such cases." 14 Cyc. 1206.

Again, it is said in the same treatise: "If the owner of an easement exceeds his rights, either in the manner or the extent of its use, or if he enters upon or uses the land of the servient estate for any authorized purpose, he is guilty of a trespass and the servient owner may maintain such action, although no actual damages have been sustained by him." Id. 1215; Ridgway *v.* Vose, 3 Allen (Mass.) 180.

As remarked, the language employed in the Roberts deed clothed both parties with community and equality of right to use the alley in any manner not incompatible with the joint user; but it cannot be interpreted to convey to the grantee of the adjoining strip of land the right to appropriate it absolutely as part of a building site, any more than it can be construed to restrict appellants' use of it to that of a mere right of way. It would be unreasonable and violative of the rights of appellants to suffer appellee to devote the ground dedicated to the alley to a use plainly not contemplated by the deed, and one which would not only deprive them of the right of way, but also of light and air and access to the alley for the purpose of maintaining their sewer, upon the deduction that filling in the doorway in the old wall necessarily manifested a determination on the part of appellants to abandon the use of the alley for the particular purpose of a right of way.

"The use to which the owner of a private way may subject it depends upon the instrument by which it is granted or reserved, or upon its common and ordinary enjoyment, where it is claimed

by prescription. If it be granted or reserved in general terms, it may be used in any manner and for any purpose reasonably necessary." Bakeman *v.* Talbot, 88 Am. Dec. 279, note.

A common and ordinary enjoyment of a permanent alley is as a source of light and air to adjacent buildings. Accordingly, it has been held, that the grant of a right to use an open court gives not only a right of way over the court, but the right to have it kept open for light and air. Salisbury *v.* Andrews, 128 Mass. 336.

The doctrine, too, is well settled that "mere nonuser of an easement created by deed for a period however long will not amount to abandonment. To show this there must be acts of the owner showing an intention to abandon, or an adverse user by the owner of the servient estate acquiesced in by the owner of the dominant estate. Nothing short of a use by the owner of the servient estate which is adverse to the enjoyment of the easement by the owner thereof for a period sufficient to create a prescriptive right will destroy the right granted." 14 Cyc. 1187. Snell *v.* Levitt, 110 N. Y. 595, 18 N. E. 370, 1 L. R. A. 414; Welsh *v.* Taylor, 134 N. Y. 450, 31 N. E. 896, 18 L. R. A. 535; Jones on Easements, § 863.

In Scott *v.* Moore, 98 Va. 668, 37 S. E. 342, 81 Am. St. Rep. 749, it is said: "That the mere failure to use an easement, unaccompanied by proof of an intention, or of some act done or omitted which is inconsistent with the future enjoyment of the right, and which clearly evinces an intention to abandon the easement, is not sufficient evidence of abandonment."

In the case of Vinton *v.* Green, 158 Mass. 428, 33 N. E. 607, cited in Jones on Easements, § 853, it was held, that one having a right of way over any alley, the only access to which was a gate through a wall from a yard in the rear of the building, could not be adjudged to have abandoned the easement by building on the yard and closing the yard with a solid wall, and thus cutting himself off from the use of the alley as a passageway, where he had opened a coal hole through the wall of the old building, though the use of the coal hole may have rendered the use of the passageway in connecting with it unlawful. Such continued use of the way for more than 20 years, with knowledge and against the will of the owner of the fee, was notice to him and all concerned that the claims of the owner of the easement were not abandoned.

It is not pretended that appellee has acquired title to the ground occupied by the alley by adverse possession, and it must be conceded that the act relied on to establish the extinguishment of the easement by abandonment is more than overbalanced by the acts of appellants in placing the windows of the new building on the alley side, evidently for the purpose of obtaining an

unobstructed flow of light and air into their building from that direction, and resorting to the alley and cementing the flagging to prevent surface water from seeping into their cellar. These circumstances repel the presumption of abandonment, which, as observed, is the foundation upon which appellee's case rests.

For these reasons the decree appealed from is erroneous, and must be reversed.

SINGER MFG. CO. *et al. v.* BRYANT.

June 14, 1906.

[54 S. E. 320.]

1. Malicious Prosecution—Actions—Evidence—Admissibility.—In an action for malicious prosecution, based on defendant, as principal, having charged plaintiff, as agent, with embezzlement, evidence of the details of a confidential interview between plaintiff and his counsel after the issuance of the warrant for embezzlement, showing plaintiff's theory of his defense to the criminal charge, and showing his self-serving declarations that he retained the moneys that he was charged with having embezzled on the ground that defendant owed him the money, was not relevant to the issue as to probable cause.

2. Evidence—Res Gestæ.—The evidence was not admissible as a part of the res gestæ as showing the manner in which plaintiff was treated, and the circumstances under which his arrest was made.

3. Malicious Prosecution—Evidence—Admissiblity.—In an action for malicious prosecution, based on defendant, as principal, having charged plaintiff, as agent, with embezzlement, evidence of a conversation between plaintiff and an agent of defendant with respect to the right of plaintiff to retain money collected by him as agent until he had procured a settlement from defendant as principal was inadmissible, in the absence of evidence showing that defendant had knowledge of the conversation prior to the institution of the criminal prosecution.

4. Same.—In an action for malicious prosecution, based on defendant, as principal, having charged plaintiff, as agent, with embezzlement, it appeared that defendant was a sewing machine manufacturing company and that plaintiff was employed as agent; that plaintiff as agent made weekly reports reciting that he had received full payment for compensation and expense items. At the time the criminal prosecution was instituted plaintiff was in default to defendant. Held, that plaintiff could not, after his discharge from the criminal prosecution, show his right to retain the money alleged by defendant to have been embezzled to repay himself what defendant owed him.